UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD REGION 29

ELMHURST DAIRY, INC.,

Respondent,

v.

Case No. 29-CA-090017

MILK WAGON DRIVERS AND DAIRY EMPLOYEES, LOCAL 584, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Charging Party.

REPLY TO GENERAL COUNSEL'S OPPOSITION TO SUMMARY JUDGMENT

BOND, SCHOENECK & KING, PLLC

Attorneys for Respondent Key Center, 40 Fountain Plaza, Suite 600 Buffalo, New York 14202 Telephone: (716) 566-2800

Of Counsel:

Robert A. Doren, Esq. Mark A. Moldenhauer, Esq.

PRELIMINARY STATEMENT

Elmhurst Dairy, Inc. ("Elmhurst") filed a motion for summary judgment on December 21, 2012, seeking deferral of the allegations in the Complainant pursuant to Collyer Insulated Wire, 192 NLRB 837 (1971), and United Technologies Corp., 268 NLRB 557 (1984). Service was made that same day upon the Regional Director for Region 29 and counsel for Milk Wagon Drivers and Dairy Employees, Local 584, International Brotherhood of Teamsters ("Local 584"). On January 4, 2013, Counsel for the Acting General Counsel filed a memorandum opposing summary judgment, arguing that general disputes of material fact exist as to the allegations in the Complaint and that the case is not otherwise appropriate for deferral.

This memorandum is submitted in reply to the Acting General Counsel's opposition and in further support of Elmhurst's motion for summary judgment. As detailed below, summary judgment is appropriate because no disputes of material fact exist relative to the issue of deferral, which is the pertinent inquiry for purposes of Elmhurst's motion. The Acting General Counsel's reference to disputes involving the underlying merits of the case is misplaced since such issues are irrelevant when assessing the appropriateness of deferral.

ARGUMENT

THE ALLEGATIONS IN THE COMPLAINT OUGHT TO BE DEFERRED TO THE PARTIES' COLLECTIVELY BARGAINED ARBITRATION PROCEDURE

A. <u>Disputes Concerning The Merits Of The Complaint Are Not Germaine To This Motion</u>

In the opposition memorandum, the Acting General Counsel takes the remarkable position that any dispute over a complaint's factual allegations will automatically preclude summary judgment on the issue of deferral. This would include cases where the non-moving party fails to articulate a single material dispute concerning the appropriateness of deferral, such

as in this matter. Because disputes as to the underlying facts exist in nearly every case, the Acting General Counsel is effectively taking the position that a Region's determination concerning deferral is immune from challenge on summary judgment, notwithstanding Board precedent and the well-established policies favoring deferral to parties' collectively bargained arbitration procedures.

Here, Elmhurst acknowledges that disputes exist concerning the factual allegations in the Complaint. To resolves these disputes, however, Elmhurst submits that it is necessary to examine several provisions in the controlling collective bargaining agreements, including the "Existing Employees" clause and the management rights clause of the Elmhurst 2010-2015 Agreement, as well as the parties' extensive negotiating history and past practices. (See Elmhurst Memorandum, dated December 21, 2012, pp. 2-8). The Acting General Counsel does not deny that a decision on the merits of the Complaint will require analysis of the parties' prior agreements and understandings, particularly concerning the terms and conditions of employees hired before July 18, 2007 verses those hired on or after that date. To the contrary, the opposition memorandum implicitly acknowledges that a trier of fact will have to conduct such an examination, although the Acting General Counsel simply submits that his own conclusory interpretations ought to be accepted as proof. Hence, his characterization of the meaning of the collectively bargained management rights clause in relation to layoff decisions. (See Opposition Memorandum, p. 6 (opining that the management rights clause "clearly only applies to the Respondent's ability to decide when lay-offs are necessary but not the manner in which they should be carried out")) (emphasis in original). Likewise, his assertion that the "Existing Employee" language agreed to by the parties was never meant to extend to terms and conditions concerning layoff. (See id., p. 4) ("[c]ontrary to Respondent's assertion that the parties have

consistently differentiated between the two groups of Unit employees for purposes of seniority ... Counsel for the Acting General Counsel will prove that the parties have always applied the principles of seniority to the Unit as a whole").

That the Acting General Counsel endeavors to characterize the meaning and significance of various provisions of the parties' labor contracts and the parties' respective intentions concerning that language only corroborates Elmhurst's argument that the case ought to be deferred to arbitration. Interpreting collectively bargained agreements and divining the parties' rights arising from prior negotiations is unquestionably a function of an arbitrator under <u>Collyer</u>.

Thus, despite any debate on the merits of the Complaint, the determinative issue on the current motion for summary judgment is whether a dispute exists concerning "the appropriateness of deferral" under Collyer. See, e.g., Southern California Edison Co., 310 NLRB 1229, 1230 (1993) (granting summary judgment and deferring to arbitration where the General Counsel and charging parties did not raise a material issue regarding "the appropriateness of [post-arbitration] deferral"); Inland Container Corp., 298 NLRB 715, 716 (1990) (same regarding "the appropriateness of [pre-arbitration] deferral"). As to this question, the Acting General Counsel does not even attempt to challenge Elmhurst's analysis of the various criteria to be considered when assessing deferral. Thus, summary judgment ought to be granted and the case deferred to the parties' contractually bargained grievance-arbitration procedure, as was done in both Southern California Edison Co. and Inland Container Corp.

¹ The Acting General Counsel argues in footnote 1 of the opposition memorandum that Elmhurst incorrectly represented the findings and procedural history in <u>Textron Lycoming, Inc.</u>, 310 NLRB 1209 (1993) in that the Board granted the respondent's "motion to defer" and not a "motion for summary judgment." Both in that case and here, the General Counsel offers mere semantics in an attempt to avoid deferral under the Board's longstanding policies. In <u>Textron</u>, the General Counsel did this by arguing that the respondent's motion to defer was effectively one for summary judgment, 310 NLRB 1209, n.3, which is contrary to the position taken in this case. The Board in <u>Textron</u> did not explicitly credit or reject this splitting of hairs, perhaps because the respondent countered that if its motion was viewed as one for summary judgment, it should be so only on the issue of deferral and not on the merits. In

B. <u>Deferral Is Appropriate In This Case</u>

The Acting General Counsel next argues that deferral is inappropriate because the seniority provision in the Elmhurst 2010-2015 Agreement is clear and unambiguous and provides that all layoffs must be conducted in reverse seniority order. (See Opposition Memorandum, p. 6). This argument incorrectly presupposes, however, that the seniority provision in the Elmhurst 2010-2015 Agreement applies to both "existing employees" hired before July 18, 2007 and "new hires" hired on or after that date. This, in turn, assumes that the "Existing Employees" provision was never intended to apply to seniority determinations or layoff decisions. Furthermore, the Acting General Counsel surmises that the management rights clause in the Elmhurst 2010-2015 Agreement only gives Elmhurst authority to decide "when" to conduct lay-offs and not the manner in which they should be carried out.

Elmhurst is confident that an arbitrator will determine after reviewing the parties' contracts, past practices and negotiating history that, under the "Existing Employees" provision, seniority is determined relative to one's status as an "existing employee" or "new hire," and not, as the Acting General Counsel surmises, "to the Unit as a whole." (See Opposition

Memorandum, p. 4). In addition, an arbitrator will conclude that the management rights clause not only gives Elmhurst the authority to decide when to conduct layoffs in general, but also when layoffs can be conducted among one subset of employees or the other. That being said, whether Elmhurst will prevail on its argument is irrelevant for purposes of its current motion for

granting the respondent's motion to defer, however, the Board followed its holding in <u>Inland Container</u>, where the deferral issue was raised and specifically referred to as a "Motion for Summary Judgment." 298 NLRB at 716. Here, it does not matter whether Elmhurst's motion is viewed as one "to defer" or one "for summary judgment on the issue of deferral." What is relevant is that deferral is appropriate under the well-established <u>Collyer</u> criteria, a point which the Acting General Counsel does not effectively refute.

² Contrary to the Acting General Counsel's speculation in footnote 2 of the Opposition Memorandum, no "requisite skill set" analysis is allowed when conducting layoffs of "existing employees" who are subject to the current MILA labor contract. Instead, this is a term and condition that was added to the collective bargaining agreement negotiated directly between Elmhurst and Local 584 and affects only "new hires."

summary judgment seeking deferral. The question is whether a final determination requires an assessment of the parties' collective bargaining agreements, negotiating history and past practices. The Acting General Counsel asserts that this question can be answered in the negative, but only by isolating one sentence of one of the applicable labor contracts and assuming that sentence operates in a vacuum. If this was a basis for declining to defer to arbitration, the Collyer doctrine would be rendered utterly meaningless.

Finally, there is no merit to the Acting General Counsel's assertion that deferral should be denied because Elmhurst's offer of six-months of continuing health care to laid off employees is "inextricably intertwined" with the layoff itself. The Section 8(a)(5) charge concerning the alleged unilateral extension of health insurance benefits is not at all intertwined with the charges relating to the layoff decision. It is based on distinct factual allegations and does not implicate any of the same proof, be it language in the collective bargaining agreement or other indicia of the parties' negotiating history. Moreover, an arbitrator can decide whether the extension of benefits was improper, taking into account the parties' prior agreements concerning the effects of layoffs of "existing employees" and the zipper clause in the Elmhurst 2010-2015 Agreement.

The circumstances of this case are entirely distinguishable from American Commercial

Lines, 291 NLRB 1066 (1988), the sole case cited by the Acting General Counsel in support of
the argument that the health insurance charge and layoff issues are "inextricably intertwined."

There, the Board found that alleged violations of Section 8(a)(5) and 8(a)(3) were sufficiently
related that deferral of only one aspect of the dispute would not be appropriate. It noted
specifically the "intricate relationship" between employee discharges and intimidation by an
employer representative who threw the parties' collective bargaining agreement in the trash,
"and further the allegation that the employees in question were terminated for engaging in

protected concerted activities...." 291 NLRB 1066, 1069 (1988). Here, the Complaint does not allege such a display of animosity towards employees' exercise of protected rights or the parties' collective bargaining relationship in general. To the contrary, it is Elmhurst that is seeking to hold the parties' to their collectively bargained agreement to arbitrate disputes concerning the application and interpretation of the relevant labor contracts. Local 584 has demonstrated its concurrence that the underlying disputes are arbitrable by filing a grievance and pursuing certain claims to arbitration. The Acting General Counsel has needlessly interjected itself into the parties' dispute and now, in an attempt to avoid deferral, proffers various conclusions concerning the meaning and purpose of various provisions in the parties' labor contract to support his position that the Complaint is based on clear and unambiguous contract language.

CONCLUSION

For the foregoing reasons, Respondent, Elmhurst Dairy, Inc., respectfully requests on Order of the Board granting summary judgment and deferring the Complaint to the parties' collectively bargained grievance-arbitration procedure.

WHEREFORE, Respondent respectfully requests that the Complaint be dismissed in its entirety and deferred to arbitration.

Dated: January 8, 2013 Respectfully submitted,

/s/ Robert A. Doren

Robert A. Doren, Esq.

Mark A. Moldenhauer, Esq.

BOND, SCHOENECK & KING, PLLC

Key Center, 40 Fountain Plaza, Suite 600

Buffalo, New York 14202

Tel: (716) 566-2800

rdoren@bsk.com

mmoldenhauer@bsk.com

Attorneys for Respondent Elmhurst Dairy, Inc.

TO: James G. Paulsen
Regional Director
National Labor Relations Board
Region 29
Two MetroTech Center, 5th Floor

Two MetroTech Center, 5th Floor Brooklyn, New York 11201

Tel: (718) 330-7700 Fax: (718) 330-7579

Stephen H. Kahn, Esq. Kahn Opton, LLP 1 Parker Plz Fort Lee, NJ 07024-2920

Tel: (201) 947-9200 Fax: (201) 402-6878

John T. Driscoll Esq.
John T. Driscoll P.C.
300 East 42nd Street, 10th floor

New York NY 10017 Tel: (212) 599-9000 Fax: (212) 972-9609

UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD REGION 29

dent,	AFFIDAVIT OF SERVICE	
NAL	Case No. 29-CA-090017	
g Party.		
Deborah L. Ostaszewicz, being duly sworn, deposes and says that she is over 18 years of age and not a party to this action; that on the 8th day of January, 2013, a true and accurate copy of the <i>Reply to General Counsel's Opposition to Summary Judgment</i> was electronically filed through the National Labor Relations Board's electronic filing system and that copies were served upon the following individuals by first-class mail, addressed as follows:		
Kahn Op 1 Parker Fort Lee,	H. Kahn, Esq. oton, LLP Plz , NJ 07024-2920 1) 947-9200	
John T. I 300 East New You	Driscoll Esq. Driscoll P.C. 42nd Street, 10th floor rk NY 10017 2) 599-9000	
	h L. Ostaszewicz	
Linda M. Grandin Notary Public, Sta Qual. In Erie Cour	etti ate of New York nty No. 01GR4794200	
	8th day of Jar n to Summar s electronic fi t-class mail, a Stephen Kahn Op 1 Parker Fort Lee Tel: (20 John T. I John T. I 300 East New Yor Tel: (21 /s/ Debora Deborah I Linda M. Grandin Notary Public, Sta	

Notary Public